No. 88-1770

Supreme Court, U.S.
FILED
1989
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1989

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether petitioner discriminated against older workers in violation of Section 4(a)(1) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 623(a)(1), by (1) disqualifying laid-off workers who were eligible for retirement benefits from receiving severance or layoff benefits from 1979 until 1982, and (2) since 1982, forcing such workers to choose between severance or layoff benefits and early retirement benefits.

2. Whether petitioner's severance or layoff policies are sheltered from liability under Section 4(f)(2) of the ADEA, 29 U.S.C. 623(f)(2) – which allows an employer to observe the terms of a "bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the Act – when petitioner has not shown that legitimate economic considerations justify its denial of severance or layoff benefits to laid-off workers who receive retirement benefits.

3. Whether the court of appeals erred when it vacated but did not reverse the district court's judgment that petitioner willfully violated the ADEA.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Discussion	3
Conclusion	4

TABLE OF AUTHORITIES

Case:

Public Employees Retirement System of Ohio v. *Betts*, No. 88-389 (June 23, 1989) 3, 4

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 2

§ 4(f)(2), 29 U.S.C. 621(f)(2) 2, 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 869 F.2d 696. The opinion of the district court (Pet. App. 51a-102a) is reported at 632 F. Supp. 343.

JURISDICTION

The judgment of the court of appeals (Pet. App. 49a), as amended on rehearing (Pet. App. 47a-48a), was entered on February 2, 1989. The petition for a writ of certiorari was filed on May 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

From 1979 until 1982, petitioner paid severance or layoff benefits only to laid-off employees who were not

eligible for retirement (including early retirement) under the terms of its pension plan. In 1982, petitioner modified its employee benefit plans to provide that laid-off employees who were eligible to retire had the option of accepting either early retirement benefits or severance or layoff benefits.* Pet. App. 8a-9a, 11a-13a.

In 1983, the Equal Employment Opportunity Commission (EEOC) filed this action alleging that petitioner's policies violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The EEOC alleged (1) that petitioner's 1979 plan discriminated against older workers by denying severance or layoff pay to employees who were eligible to retire; and (2) that petitioner's 1982 plan discriminated on the basis of age by forcing employees who were eligible to retire to give up either severance or layoff pay or early retirement benefits. After a bench trial, the district court held that petitioner's treatment of retirement-eligible workers was willful age discrimination, and that it was not shielded by Section 4(f)(2) of the ADEA, which allows an employer to observe the terms of a "bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the Act. Pet. App. 51a-102a.

The court of appeals affirmed the judgment of the district court that petitioner had violated the ADEA and was not protected by Section 4(f)(2). Pet. App. 1a-45a. Following the approach of the EEOC's regulations, the court held that "[i]n order to qualify as exempt from § 4(f)(2), a plan must involve age-related cost factors: *i.e.* the cost of providing benefits pursuant to the plan must increase with age." *Id.* at 27a. Because petitioner "neither

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* Employees who choose severance or layoff benefits receive their vested pension benefits at age 65.

provides actuarial proof nor even alleges that it costs more to provide older employees with the same severance benefits as younger employees" (*id.* at 28a), the court held that petitioner could not find shelter in the safe harbor of Section 4(f)(2). The court of appeals vacated the district court's judgment that the violation was willful, and remanded for reevaluation of that issue.

DISCUSSION

In *Public Employees Retirement System* v. *Betts*, No. 88-389 (June 23, 1989), slip op. 9-15, this Court rejected the EEOC's interpretation of Section 4(f)(2). Contrary to the EEOC's argument that "§ 4(f)(2) protects age-based distinctions in employee benefit plans only when justified by the increased cost of benefits for older workers" (slip op. 9), the Court held that "§ 4(f)(2) generally protects age-based reductions in fringe benefits" (slip op. 20). The Court interpreted Section 4(f)(2) as requiring that "when an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation." Slip op. 20.

The court of appeals did not consider whether petitioner's plans are shielded by Section 4(f)(2) under the test set forth in *Betts*. Rather, it analyzed petitioner's plans under the EEOC's regulations, which were invalidated by this Court. If petitioner is protected by Section 4(f)(2) as interpreted in *Betts*, then the other questions it raises in its petition for a writ of certiorari—whether it discriminated against older employees and, if so, whether it did so willfully—need not be reached. Accordingly, the decision below should be vacated and the case should be remanded

for the court of appeals to reconsider its decision in light of *Betts*.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded to that court for reconsideration in light of the decision in *Public Employees Retirement System* v. *Betts*, No. 88-389 (June 23, 1989).

Respectfully submitted.

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